United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7374

To be argued by
JOHN PAUL REINER

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

MATTHEW J. LAWLOR,

Plaintiff-Appellee,

—against—

THE GALLAGHER PRESIDENTS' REPORT, INC.,
and CYNTHIA A. BILLINGS,

Defendants-Appellants,

—and—

GULF & WESTERN INDUSTRIES, INC., DAVID N. JUDELSON
and MARTIN S. DAVIS,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE LLOYD F. MACMAHON, DISTRICT JUDGE

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

Defendants-Appellants, The Gallagher Presidents' Report, Inc. ("Report"), the publisher of a weekly newsletter known as The Gallagher Presidents' Report ("Presidents' Report") and Cynthia A. Billings ("Billings"), the President and Editor of the Presidents' Report, submit this brief in reply to the answering brief of plaintiff-appellee, Matthew J. Lawlor ("Lawlor") in the appeal from the judgment entered on June 6, 1975 by the

United States District Court for the Southern District of New York (MacMahon, J.) awarding damages of $45,000 for an allegedly defamatory article published in the weekly edition of the Presidents' Report dated May 22, 1973.

POINT I

THE HOLDING OF THE TRIAL COURT THAT ONE PHRASE OF THE ARTICLE WAS FALSE AND DEFAMATORY IS NOT A FINDING SUBJECT TO THE "CLEARLY ERRONEOUS" TEST

Point I of the Appellee's Brief is bottomed on his claim that the District Court's holding - that the single phrase "Extracted fees for placement of executives with G + W" makes the entire article false and defamatory - should not be disturbed unless such a finding is "outrageously wrong"* (Appellee's Brief p. 16). While not citing the "clearly erroneous" test under Rule 52(a) of the Federal Rules of Civil Procedure ("Rule 52(a)")**, Point I unquestionably rests on that principle.

The argument is fallacious since this holding is not a finding of fact under Rule 52(a) but rather either a conclusion

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* On page 16 of Appellee's Brief, the argument is made as follows: "Judge MacMahon, as the trier of the facts, found the 'sting' in the offensive words and found that it pervaded the entire article. His findings as a trier of the facts were not so outrageously wrong that as a matter of law they should be disturbed."

** Rule 52(a) states in relevant part: "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses..."

of law, a mixed question of law and fact, or a finding of ultimate fact not subject to the clearly erroneous test. Even if it were a finding of fact subject to the Rule 52(a) test, the Court's holding based on multiple inferences drawn from a selective dictionary meaning, erroneous statutory interpretation, and substitution and addition of words to the single phrase in question would more than meet the "clearly erroneous" test of Rule 52(a).

A. The Clearly Erroneous Test Under Rule 52(a) Does Not Apply Here

The "clearly erroneous" test of Rule 52(a) is essentially directed to findings of evidentiary facts. Hedger v. Reynolds, 216 F. 2d 202, 203 (2d Cir. 1954); United States v. Aluminum Co. of America, 148 F. 2d 416, 433 (2d Cir. 1945).

It does not apply to the District Court's conclusions of law or conclusions predicated on mixed questions of law and fact. 5A Moore's Federal Practice, ¶52.03[3] at p. 2662.

In this case, Judge MacMahon found actionable defamation by construing the quoted phrase as having only one possible meaning, i.e., the publication charged plaintiff with the crime of taking "kickbacks" in violation of Section 198-b(2) of the New York Labor Law. In order to arrive at this holding, the District Court necessarily found the language of the alleged defamatory publication to be clear and unambiguous. This finding of clear and unambiguous meaning for the phrase is then one of

law and not of fact under settled and controlling New York law. See Pauling v. News Syndicate Company, Inc., 335 F. 2d 659, 663 (2d Cir. 1964) cert. denied, 379 U.S. 968 (1965); Tracy v. Newsday, Inc., 5 N.Y. 2d 134, 136, 182 N.Y.S. 2d 1, 3 (1959). Accordingly, the District Court's determination is not a finding subject to the "clearly erroneous" test.

Even if the language of the article were ambiguous, the District Court's interpretation of the meaning of the article is subject to free and untrammelled review by the Court of Appeals since the interpretation given to writings constitute matters of law and not findings of evidentiary facts. Eddy v. Prudence Bonds Corporation, 165 F. 2d 157 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948). In Eddy, supra, Judge Learned Hand stated that: "...appellate courts have untrammelled power to interpret written documents," 165 F. 2d at 163. In similar situations involving the construction of written documents, the Federal Appellate Courts have held that they are not bound by the findings and conclusions of the trial court. See e.g., Rockwood & Co. v. Adams, 486 F. 2d 110, 112 (10th Cir. 1973) (interpretation of a contract); Emor, Inc. v. Cyprus Mines Corporation, 467 F. 2d 770, 773 (3rd Cir. 1972) (interpretation of a sales agreement); Wooddale, Inc. v. Fidelity and Deposit Company of Maryland, 378 F. 2d 627, 631 (8th Cir. 1967) (interpretation of a fidelity bond).

Moreover, full review is particularly appropriate here since there is no essential difference or controversy before this

Court as to the basic evidentiary facts as found by the District Court. Orvis v. Higgins, 180 F. 2d 537 (2d Cir. 1950); Iravini Mottaghi v. Barkey Importing Co., 244 F. 2d 238 (2d Cir.), cert. denied, 354 U.S. 939 (1957); Emor, Inc. v. Cyprus Mines Corporation, supra. In Emor, supra, the Court of Appeals stated that it was not bound by the "clearly erroneous" test in interpreting a document and specifically based its holding on the proposition as follows 467 F. 2d at 773:

> "...Moreover, we emphasize that we have no essential difference with the facts as found by the district court. Additionally, we note that the parties themselves differ little as to the essential facts. In these circumstances, this court is free to draw its own inferences as to the significance of the facts as they relate to the construction of paragraph 2(a). Dingman v. United States, 429 F. 2d 70, 72 (8th Cir. 1970), and cases cited therein."

At the very least, the District Court's conclusion of actionable defamation is a finding of an ultimate fact or a mixed question of law and fact. In its decision, the District Court drew inferences upon inferences to arrive at the construction given to the quoted phrase, then construed the modified phrase to charge a violation of Section 198-b(2) of the Labor Law (the "kickback" statute) and, finally concluded that the phrase so modified and interpreted by the Court distorted the truth as to make the entire article false and defamatory. In such circumstances, the Court of Appeals will review the decision of the District Court de novo unencumbered by the "clearly erroneous" test of Rule 52(a). See, e.g. University Hills, Inc. v. Patton, 427 F. 2d 1094 (6th Cir. 1970); Shultz v. Wheaton Glass Company,

421 F. 2d 259, 267 (3rd Cir.) cert. denied, 398 U.S. 905 (1970); Lehmann v. Acheson, 206 F. 2d 592, 594 (3rd Cir. 1953). In University Hills Inc. v. Patton, supra, the Court interpreted the effect of certain written agreements and stated the several factors warranting full review which are applicable here as follows (at p. 1099):

> "Although findings of fact adopted by a District Court are binding on an appellate court unless clearly erroneous, Fed.R.Civ.P. 52(a), the interpretation of written contracts, conclusions of law, mixed questions of fact and law, and findings as to an ultimate fact, adopted by the court, are not subject to the rule and are within the competence of an appellate court. Cordovan Associates, Inc. v. Dayton Rubber Co., 290 F.2d 858, 859-860 (6th Cir. 1961); cf. Union Planters Nat'l. Bank v. United States, 115 F.2d 426 (6th Cir. 1970)."

In view of the foregoing settled construction given to Rule 52(a), it is clear that the determination of the District Court does not constitute findings of evidentiary facts but rather constitute conclusions of law, conclusions based upon mixed questions of law and facts, or findings of ultimate facts.

B. The Holding Below was "Clearly Erroneous"

Although the "clearly erroneous" test of Rule 52(a) has no applicability, even under this strict standard, the decision below must be reversed. United States v. United States Gypsum Co., 333 U.S. 364 (1947). In that case, the Supreme Court held that: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left

with the definite and firm conviction that a mistake has been committed". 333 U.S. at 395. In view of the totality of the record evidence and the evidentiary findings of the District Court concerning Lawlor's unlawful activities in forming the Mark Group as his own personal venture and his misappropriation of corporate property and assets, coupled with the District Court's finding of substantial truth with respect to Judelson's accusations of fraud and deceit as to the first count of the complaint, there can be no doubt that the District Court committed obvious error in supplying its own unique meaning to the article and in rejecting appellants' defenses, including the defense of substantial truth. Furthermore, the District Court's finding of negligence in the publication of the article has no foundation in the record evidence (see Point IV infra). Finally, the award of $45,000 to plaintiff as a "fair recovery" cannot stand in face of Lawlor's serious wrongdoing and the total absence of any evidentiary support for such an award (see Point V infra).

C. The Presence of Constitutional Issues Requires Full Review of the District Court's Findings

As a separate principle applicable here, the "clearly erroneous" test under Rule 52(a) does not apply in those actions involving constitutional issues. Time, Inc. v. Pape, 401 U.S. 279, (1971); Firestone v. Time, Inc., 460 F. 2d 712 (5th Cir.), cert. denied, 409 U.S. 875 (1972). In Time, Inc. v. Pape, supra, the

Supreme Court stated (401 U.S. at 284):

> "The only question before us, therefore, is whether the Court of Appeals correctly applied this constitutional rule to the facts of this case in reversing the directed verdict for the defendant. Inquiries of this kind are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.' Niemotko v. Maryland, 340 U.S. 268, 271. Cf. Napue v. Illinois, 360 U.S. 264, 271-272. And in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the ... record to determine whether it could constitutionally support a judgment' for the plaintiff. New York Times, supra, at 284-285; Beckley Newspapers v. Hanks, 389 U.S. 81, 83; St. Amant v. Thompson, 390 U.S. 727; Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6, 11."

In Firestone v. Time, Inc., supra, the Fifth Circuit took note of the Supreme Court's ruling in Time, Inc. v. Pape, supra, and stated (460 F. 2d at 718-19):

> "Likewise, it should be remembered that since our review of the facts of the case is de novo, we are not bound by the findings of the District Court. Time, Inc. v. Pape, 401 U.S. 279, 284, 91 S.Ct. 633, 636-637, 28 L.Ed.2d 45 (1971). It is at once apparent that the scope of review of First Amendment libel cases is the broadest possible under the law. The Supreme Court has fashioned such broad review because our early history and expressions by our founding fathers, such as Madison, indicate that liberty of the press is considered sacred in America, and that our free society is dependent for its survival upon a vigorous free press. The immunity conferred by the First Amendment in favor of a publication is therefore designed more for the protection of the public generally than it is for the publisher himself." (footnotes omitted)

See also, Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

In the instant action, the District Court erred in concluding that New York State had adopted the minimum negligence standard permitted in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) as a matter of federal constitutional law and further erred in concluding that appellants were negligent in the publication of the article concerning plaintiff. Since these issues, among others, raise First Amendment constitutional considerations, the Court of Appeals must review the record de novo in order to determine if the judgment below is supported by the evidentiary facts.

In summary, the first point in Appellee's Brief is devoted solely to the proposition that Judge MacMahon's holding as to the meaning of the alleged defamatory article should not be disturbed. Since this argument is based upon an incorrect proposition of law, it should be ignored, and this Court should examine de novo the record evidence and the findings of evidentiary facts of the District Court. In so doing, we submit that the Court will determine that the article is true in substance; that the District Court distorted the plain meaning of the quoted phrase; and that plaintiff failed to meet the burden of proof required in First Amendment cases. Accordingly, a reversal of the decision below is required.

POINT II

THE CONSTRUCTION GIVEN TO THE RELEVANT PHRASE WAS UNREASONABLE AND STRAINED

Plaintiff's attempt to defend the decision below is admittedly based upon the proposition set forth in his brief that it was not unreasonable or strained for the District Court to infer additional words to the phrase at issue, namely that fees were taken from unwilling executives.* This attempt fails on the basis of the record.

There is not one scintilla of proof in the record to support the District Court's addition of the words "from unwilling executives" as the meaning to be given to the quoted phrase. There is not one scintilla of proof in the record that anyone believed or understood that plaintiff was charged with taking a kickback in violation of the Labor Law. Plaintiff, the person most interested in the issue, never contended in his complaint or

* The argument in full by Appellee is as follows: "The District Court's construction of the statement in the article: 'Extracted fees for placement of executives with G&W',that when combined with the remainder of the phrase, 'can only mean' that Lawlor, through Mark Group, compelled 'kickbacks' from unwilling executive applicants to Gulf & Western as a condition for employment with Gulf & Western in violation of Section 198-b(2) of the New York Labor Law (418A - 419A) was reasonable and not strained. While the words of the statement make no reference as to who paid the fees to Lawlor or the Mark Group, it was not unreasonable to infer the additional words 'from unwilling executives', for from whom else would such fees be 'extracted'." (Appellee's Brief, pp. 18-19).

in any of the proceedings below that he was charged with such conduct. On the contrary, his sole and clear contention was that he was charged with extracting fees from Gulf. The District Court in its opinion acknowledged this fact (415A, 417A). Nevertheless, the District Court inferred the additional words and then added another inference upon the first inference to arrive at the conclusion that this modified phrase then charged a violation of the New York State Labor Law.

Despite plaintiff's contentions, the decision of the District Court cannot be supported factually or as a matter of law.

A. Section 198-b(2) of the New York Labor Law Is Inapplicable

In Point II-A of his brief, plaintiff strains to avoid the plain meaning and intent of Section 198-b(2) of the New York Labor Law (the "kickback" statute). His reliance on People v. Sherman, 201 Misc. 780, 106 N.Y.S.2d 36 (Ct. Gen. Sess. N.Y. Co. 1951) is misplaced. In that case the Court applied the provisions of this statute (former Section 962 of the Penal Law) to "chargemen" employed by candy corporations to solicit sales of refreshments in theatres. As noted in our main brief, that Court simply followed a number of precedents under New York's Workmen's Compensation Law which have construed the term "workman" as including an undefined category of manual or skilled workers.

It is illogical and, indeed, frivolous to argue that the type of employee characterized as a workman under the statute includes an executive applying for a position with a large corporation. From the very language quoted by plaintiff in People v. Sherman, supra, it is clear that the statute was intended to protect those wage earners who were unable to protect themselves by virtue of their position as workmen or for whose benefit unions have entered into contracts. To the same effect, see People (Complaint of Rabinowitz) v. Desowitz, 166 Misc. 1, 2 N.Y.S.2d 87 (New York City Magistrate's Court 1938) also cited by plaintiff. The same criteria could hardly apply to executive applicants within the framework of this penal statute now incorporated into the Labor Law.

Finally, plaintiff argues that even if executives are not workmen under the kickback statute, nevertheless the charge against plaintiff is defamatory because it accused him of conduct quite similar to those crimes (Appellee's Brief, p. 22). This argument is fallacious. The article in the Presidents' Report never used the word "extortion" or "kickback". It referred to the questionable practices and procedures in setting up an arcane and complex device whereby plaintiff took fees for the placement of executives. The plain meaning of the phrase in the context of the article does not infer a charge akin to the criminal charge of extortion or violation of the Labor Law as plaintiff claims in his brief. Indeed, just as the Supreme Court of the United States in

Greenbelt Cooperative Pub. Ass'n. v. Bresler, 398 U.S. 6 (1970) construed the plain meaning of word "blackmail" as used therein to be non-actionable since it did not charge the crime of blackmail, so too, in this case the use of the word "extract" in fair context, even if considered hyperbole or vigorous comment, does not charge any crime of extortion (see pages 28-29 of Appellants' Brief).

B. Lawlor's Wrongdoing Was Not Magnified In View of Other More Serious Potential Charges

In Point II-B of his brief, plaintiff argues that other criminal charges which could have been asserted against him in view of the District Court's findings of evidentiary facts are not a defense in this action. This argument lacks merit because the District Court found that plaintiff in fact committed serious wrongs but found actionable defamation only because the wrongs were magnified. Once it is demonstrated that the wrongs were not magnified, and indeed were understated, the predicate for the District Court's decision falls of its own weight.

Lawlor further contends that these other acts of wrongdoing were not available to the readership and cannot be inferred from the language of the article. This argument misconstrues the defense of substantial truth, i.e., whether the libel as published would have a different effect on the readers than the truth would

have produced. Whether or not the readership had available the evidentiary facts developed in the District Court supporting other criminal charges is irrelevant. Under the applicable law, appellants proved the substantial truth of the plain meaning of the article and thus have a complete defense as found and applied by the District Court here to the claims asserted against defendants Gulf & Western and Judelson.

Furthermore, the taking of corporate assets in violation of the larceny, fraud or theft of services laws are reasonably inferable from the article. The District Court found these facts to be true. Plaintiff cannot have it both ways. In one instance he argues that the District Court may add words to the relevant phrase and yet, at the same time, he would not have this Court conclude that other graver crimes could have been charged so that the "sting" of the article arising out of the operative facts would not be greater so as to make the reader think less highly of plaintiff.

In the final analysis it is not a question of whether the article accused plaintiff of extortion, kickbacks, larceny or any crime, but rather whether the published article was so far different from the truth that Lawlor's reputation could be damaged. In view of the evidentiary facts found by the District Court this is not possible. Clearly, the answer is that plaintiff has no complaint of defamation with respect to an understatement of his wrongdoing and the District Court's holding is untenable.

POINT III

THE DEFENSE OF PRIVILEGE UNDER CONSTITUTIONAL STANDARDS AND INDEPENDENTLY UNDER NEW YORK LAW APPLIES TO THE PUBLICATION OF THE ARTICLE IN THE PRESIDENTS' REPORT

The District Court's finding that plaintiff failed to prove malice requires reversal of the judgment as a matter of law. In Point III of his brief, plaintiff attempts to obscure the constitutional standards required under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) with the separate law of New York which provides greater protection for publishers such as appellants here than that mandated as a minimal requirement by the Supreme Court under the United States Constitution in Gertz v. Robert Welch, Inc., supra.

As noted in appellants' primary brief, there are three independent grounds for reversal:

(A) The first independent ground for the defense of privilege is based upon the law of New York which requires a showing of malice in the publication of an article about a private individual involved in a matter of public interest (see page 38 of Appellants' Brief).

(B) The second independent ground is predicated upon constitutional standards which required that plaintiff prove knowledge of falsity or reckless disregard of the truth in the publication since plaintiff was a limited public figure involved in a subject reported in a limited publication (see page 44 of Appellants' Brief).

(C) Finally, the third independent ground is based upon New York law which requires proof of falsity and malice in the publication since the published article was directed to those people having a common interest in the subject matter of the article, namely, the right of the subscribers of the Presidents' Report to know of the activities of the senior management at Gulf & Western (see page 49 of Appellants' Brief).

Plaintiff fails to distinguish these three independent grounds in Point III of his brief and argues that the District Court properly relied upon a negligence test in rejecting appellants' privilege defense.

A. Defense Under the New York Standard

Contrary to plaintiff's argument, New York has adopted a complete defense which comports with the standard set forth in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) as specifically allowed to be adopted by the states in Gertz, supra.

The New York standard applies to publications relating to private individuals involved in matters of public interest. There can be no real dispute that the activities of senior management of a major American company such as Gulf & Western including those of plaintiff here are as much a matter of legitimate public interest as those matters involving the arrest of a person distributing obscene magazines, Rosenbloom v. Metromedia, Inc., supra; the quality of food in a restaurant, Twenty-Five East 40th Street Restaurant Corp. v. Forbes, Inc., 30 N.Y. 2d 595, 331 N.Y.S. 2d 29 (1972); or a dispute about garbage disposal, Frink v. McEldowney, 29 N.Y. 2d 720, 325 N.Y.S. 2d 755 (1971). As these cases and the numerous other cases cited at pages 41-42 of the main brief demonstrate, the voluntary activities of plaintiff here were a subject of legitimate public interest to the readers of the Presidents' Report.

The article about Lawlor's discharge from Gulf & Western would be a matter of newsworthy interest whether the report was published in the Presidents' Report, the financial pages of the New York Times or the Wall Street Journal. The activities of senior management personnel of major American companies are regularly reported in all these publications. Indeed, where a publication such as the Presidents' Report is directed specifically to the group of people having the greatest interest in the senior management of major corporations, the subject matter of the article is even of more and certainly no less legitimate interest to that readership.

The New York standard, comporting with the Rosenbloom standard and as permitted by Gertz, clearly applies in the instant case and mandates that the complaint be dismissed as a matter of law in view of the District Court's finding that the article was not published with knowledge of falsity or with reckless disregard of the truth on the part of the Presidents' Report or the Editor, Billings.

B. Constitutional Standard

As a totally different concept, the constitutional standards under Gertz v. Robert Welch, Inc., supra, were discussed as part of the arguments at trial. With respect to the quote from the trial transcript cited on pages 28-29 of Appellee's Brief, appellants were arguing that, as a matter of constitutional law, plaintiff had failed to prove fault in the publication as part of the plaintiff's prima facie case and that, as a result, the motion to dismiss made at the end of the plaintiff's case, upon which the Court reserved decision, should then be granted at the close of the trial. The discussion related directly to the standard of fault required by Gertz as a minimum constitutional requirement for any plaintiff to prove actionable defamation. That minimum constitutional standard under Gertz is a negligence standard.

It is disingenuous for plaintiff to argue that this discussion of the constitutional standard required under Gertz,

somehow evolves into an admission* that the New York standard for actionable defamation under the circumstances proved at trial was the negligence standard and not the greater protection required by New York law.

Contrary to plaintiff-appellee's argument, the "negligence test" for actionable defamation is not the law of New York and the District Court erred in so holding. The New York decision cited by plaintiff at page 31 of his brief, Bolam v. McGraw Hill, Inc., (Sup. Ct., New York County, N.Y.L.J., 8/25/75, page 6, col. 1), gives no solace to plaintiff in this matter.

A careful reading of Bolam clearly indicates that the Court found that the Rosenbloom rule applied to private individuals involved in the matter of public interest, even post-Gertz. The disputed issue in that case was whether or not the plaintiff had been involved at all in the subject matter of the complained of publication. The Court there reasoned:

> "In the instant case, the analogy would be to a case where, as in All Diet, the article was about food fads and referred to one not connected in any way to that field and emphasized his denials of involvement. Absent proof of that

* It should also be noted that any statements at trial concerning the Supreme Court's holding in Gertz do not have "sufficient formality or conclusiveness to be a judicial admission". See Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F. 2d 532, 542 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966). In any case, appellants never conceded or admitted that New York had adopted a negligence standard under Gertz.

> involvement with the subject matter, the protection granted the subject matter does not extend to those not connected therewith." (Emphasis supplied) (N.Y.L.J., 8/25/75, page 6, col. 1)

Thus, Bolam not only does not support plaintiff's position but strongly supports the principle that plaintiff's failure to establish malice in the instant case is fatal to his claim as a matter of New York law. (See Appellants' Brief, Point III). Here it cannot be seriously suggested that Lawlor was not intimately involved through his voluntary and wrongful activities in the subject matter of the complained of publication.

Accordingly, there are two distinct standards of protection having their genesis in the rationale of the decision of New York Times Co. v. Sullivan 376 U.S. 254 (1964) namely, the federal constitutional standards of Gertz and the New York test applying the Rosenbloom rationale to private individuals.

C. Common Interest Defense Under New York Law

The third independent defense of privilege in the trilogy of defenses - the common interest defense - has not been successfully attacked by plaintiff (see Point III of Appellee's Brief at page 33).

Contrary to plaintiff's argument, there can be little doubt that there is a direct relationship first, between the subscribers of the Presidents' Report and the publication itself

and secondly, a relationship between the readership of the Presidents' Report and Lawlor. The article related to Lawlor's voluntary interjection into a controversy involving the senior management of one of the major American corporations whose activities are the direct and specific subject matter of the Presidents' Report. The readers of the Presidents' Report subscribe to the publication to learn the very type of information set forth in the Presidents' Report about Lawlor.

Since the predicates for the common interest privilege under New York law are present here, this defense can only be defeated by proving falsity and actual malice in the publication of the article. Plaintiff has not done so as specifically found by the District Court below.

In summary, the Presidents' Report should be protected and the article held non-actionable under both constitutional standards and the independent law of New York State because the information has justifiable value to the people subscribing to the publication. Accordingly, the decision below should be reversed as a matter of law.

POINT IV

THE RECORD DOES NOT SUPPORT THE DISTRICT COURT'S FINDING OF NEGLIGENCE IN THE PUBLICATION OF THE ARTICLE

While proof of negligence in the publication mandated by Gertz as a minimum constitutional standard does not apply here, even under that standard the District Court's finding of negligence is contrary to the record evidence.

Although plaintiff argues that the District Court's finding of negligence is amply buttressed by the record, an examination of the record evidence including the in camera testimony of Billings clearly shows that reasonable steps were taken in the publication of the article. The District Court's finding of negligence is predicated in large measure upon its conclusion that Billings' initial testimony was general and in conflict with her later in camera testimony (438A at n. 21). The District Court then went on to arbitrarily and erroneously disregard her testimony as to the care taken in checking the accuracy of the article.

The circumstances surrounding this testimony and the actions taken by the District Court should be considered. At the trial, Billings' testimony when she took the stand was naturally "general" because she had asserted the protection of New York's Shield Law (N.Y. Civil Rights Law §79-h). Judge McMahon refused to accept

Billings' claim of confidentiality as to her sources and struck the entire answer which included not only the defense based upon reliable sources, but also the defense of truth and other privilege and constitutional defenses. The Court then directed judgment for plaintiff (400A). This was done over the objection of appellants' counsel, who pointed out to the District Court that the defense of truth was absolute and not dependent upon testimony as to confidential reliable sources or the reasonableness of the steps taken in checking the accuracy of the article (401A). After consultation with counsel concerning the drastic consequences of the District Court's ruling, Billings waived the statutory protection and testified in detail in camera under a secrecy order as to her sources. The District Court vacated the order striking the entire answer.

An examination of Billings' testimony in camera clearly shows that it was not in conflict with her earlier "general" testimony concerning the background information she received with respect to Lawlor's Mark Group activities. It was prejudicial error for the District Court to disregard Billings' testimony, particularly the testimony given in camera where Billings was forthright and complete on all questions asked by plaintiff's counsel in cross-examination and by the Court itself. A reading of that portion of the trial record under seal indicates that the District Court's disregard of Billings' testimony was unreasonable.

The testimony of Billings *in camera* plus all the other proofs described in appellants' brief (Point IV at p. 54) show that the District Court committed reversible error in its finding of negligence as required by *Gertz* even under the strict standards of the "clearly erroneous" test of Rule 52(a).

It should be noted that the authority cited by plaintiff, *Klein* v. *Biben*, 188 Misc. 681, 68 N.Y.S. 2d 759 (Sup. Ct. N.Y. Co. 1947), as justification for the District Court's finding of negligence as a matter of fact is entirely inapposite and non-supportive of plaintiff's contention, since that Court was only concerned with the sufficiency of several pleaded defenses, including the defense of reliable sources used in preparation of the publication. The Court in *Klein* held that under state pleading rules, more specificity was required and plaintiff there was granted leave to replead the defenses striken.

Since the District Court's finding of negligence is unsupported by the record, appellants' constitutional defenses must be sustained and the decision below reversed.

POINT V

PLAINTIFF IS NOT ENTITLED TO SUBSTANTIAL COMPENSATORY DAMAGES

Assuming arguendo the article printed about plaintiff was actionable defamation, New York law requires that only nominal damages of six cents be awarded.

Plaintiff's argument that the damages of $45,000 awarded by the District Court were reasonable is based solely on the proposition that plaintiff enjoyed a good reputation which was undermined in the article published in the Presidents' Report and that this caused him pain and mental anguish. There are two fallacies in plaintiff's arguments.

First, the Supreme Court in Gertz has mandated that general damages for pain and mental anguish cannot be presumed at least absent a finding of malice since this is a draconian measure akin to an award of punitive damages. If the complete story of plaintiff's wrongdoing as found by the District Court had been printed, it could hardly be said that plaintiff would have suffered less mental anguish than what he claims to have suffered from the article as published. The District Court had no record evidence to support any such assumption.

Secondly, as for plaintiff's reputation, there was little reputation for him to lose in view of the District Court's findings of wrongdoing which acts are susceptible of charges far more serious

than any violation of the "kickback" provisions of the New York Labor Law.

In the record before the Court, there is no showing that Lawlor suffered any actual or special damages. There is no proof that he had been held up to public ridicule or was shunned or scorned by any one individual. Indeed, the only record evidence there is shows that plaintiff was unable to obtain employment not because of the publication of the article about him but because of the justified refusal of Gulf & Western to give Lawlor a recommendation upon inquiry from prospective employers. Without a scintilla of proof in the record, the District Court could not award compensatory damages based upon presumed mental anguish or loss of reputation under Gertz. Only nominal damages could have been awarded.

The arguments made in plaintiff-appellee's brief in no way support the conclusion that $45,000 was a fair recovery under the circumstances here. The cases cited by plaintiff in no way support his contention that under the circumstances of this case substantial compensatory damages are appropriate. These cases for the most part pre-date the Supreme Court's holding in Gertz or are based upon findings of actual malice to support the award of substantial damages therein. Faulk v. Aware Inc., 19 App. Div. 2d 464, 244 N.Y.S. 2d 259 (1st Dep't 1963), aff'd, 14 N.Y. 2d 899, 252 N.Y.S. 2d 95 (1964), cert. denied, 380 U.S. 916 (1965)

(libelous statements made not recklessly but deliberately); Foerster v. Ridder, 57 N.Y.S. 2d 668 (Sup. Ct. N.Y. Co. 1945) (conclusive evidence of actual malice found); Polakoff v New York World Telegram Corp., 1, App. Div. 2d 884, 149 N.Y.S. 2d 872 (1st Dep't. 1956) aff'd, 2 N.Y. 2d 901, 161 N.Y.S. 2d 151 (1957) (pre-New York Times Co. v. Sullivan, where privilege not discussed). Bailey v. Hahn, (Sup. Ct. West Co., N.Y.L.J. 7/23/74 at page 12, col. 7) simply repeated the language of Gertz; Caldwell v. Bantam Books Inc., (Sup. Ct. N.Y. Co. N.Y.L.J. 11/1/74 at page 17, col. 2) and Levine v. Kiss, 47 App. Div. 2d 544, 363 N.Y.S. 2d 101 (2nd Dep't 1975) have absolutely no relevance to plaintiff's contention because no award of damages was involved therein.

In none of the cases cited by plaintiff-appellee were mitigating circumstances of the kind presented here considered by the Court. The magnitude of the award here reflects just that type of excessive and unsupported damage recovery which the evidentiary requirements of Gertz are designed to preclude. Such award cannot be permitted against publications, absent a demonstration of malice, without having the "chilling effect" which would undermine our free press.

In summary, there is nothing in the record to support this excessive award of compensatory damages. The only proper measure under New York law and, indeed, under constitutional standards enunciated in Gertz, would be nominal damages of six cents.

CONCLUSION

The arguments of plaintiff-appellee lack merit and the decision below should be reversed for the reasons set forth herein and in defendants-appellants' primary brief.

Respectfully submitted,

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